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Supreme Court, U.S.
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No. 97-1792

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LYLE DAVID PIERCE, III, also known as Sealed Deft. 2, also known as Joe Martin, also known as Joe Boy,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER LYLE DAVID PIERCE, III

SHELDON KRANTZ
(Counsel of Record)
PIPER & MARBURY L.L.P.
1200 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 861-3900

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REPLY BRIEF FOR PETITIONER LYLE DAVID PIERCE, III

Lyle David Pierce, III, hereby submits this reply to the United States' Opposition to his petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

The government concedes in its brief in opposition that the United States Court of Appeals for the Second Circuit's decision in *United States v. Trapilo*, 130 F.3d 547 (2d Cir. 1997), is in direct conflict with the First Circuit's decision in *United States v. Boots*, 80 F.3d 580 (1st Cir.), *cert. denied*, ____ U.S. ____, 117 S. Ct. 263 (1996). SG Opp. 11.[1] It further acknowledged that if this Court is "inclined to resolve the conflict before it deepens, we [the Solicitor General's office] are not aware of any reason why this would be an unsuitable case in which to do so." SG Opp. 12.

The only argument the government has made against resolving the conflict at this time is that it currently exists in only two United States Circuit Courts of Appeals. The Solicitor General has often sought and this Court has often granted certiorari in just such a situation. *See, e.g., United States v. Mezzanatto*, 513 U.S. 196 (1995) (granting certiorari to resolve conflict between the Ninth and Sixth Circuits on admission of plea statements for impeachment); *United States v. John O. Irvine and First Trust Nat'l Ass'n*, 511 U.S. 224 (1994) (granting certiorari to resolve conflict between the Eighth and Eleventh Circuits regarding a gift tax issue); *United States Nat'l Bank of Oregon v. Independent Ins. Agents of America*, 508 U.S. 439 (1993) (granting certiorari to resolve conflict

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[1] All "SG Opp." citations refer to the Solicitor General's Brief in Opposition to Mr. Pierce's Petition for a Writ of Certiorari.

between the D.C. and Second Circuits concerning whether Title 12, section 92, was valid law); *United States v. California*, 507 U.S.746 (1993) (granting certiorari to resolve conflict between the Ninth and Eleventh Circuits over illegal state taxation issue). Moreover, this Court frequently grants certiorari in cases where the United States, such as in this case, acknowledges the conflict and concedes that the issue warrants review. *Id.*

There are important reasons why this Court should resolve the conflict that exists between the First and Second Circuit Courts of Appeals now. New and "creative" initiatives by federal prosecutors to apply fraud and money laundering statutes to alleged schemes involving foreign governments, first of all, raises significant questions about the interrelationship of federal prosecutions with foreign policy considerations and the common law "revenue rule."

The current and direct conflict between the First and Second Circuits further fosters uncertainty about the international reach of federal criminal statutes, encourages prosecutorial "forum-shopping," and permits disparate treatment of persons allegedly engaged in similar activities. The use of the wire fraud statute to prosecute aboriginal persons for the transportation of goods from sovereign areas straddling the United States - Canadian border into Canada also raises substantial issues concerning the rights of aboriginal people under Canadian law and international treaties.

The government argues in its opposition that the language of the wire fraud statute is broad and applies to "*any* scheme or artifice to defraud." SG Opp. 5. The view that the fraud statutes essentially have no boundaries ignores the constraints imposed by this Court in *McNally v. United States*, 483 U.S. 350 (1987), and the admonition of the Eleventh Circuit in *United States v. Brown:*

> The implications of allowing the federal fraud statutes to be treated by federal prosecutors as a largely unlimited device to attack wrongdoing whenever prosecutors feel wrongdoing exists are extremely worrisome to us.

79 F.3d 1550, 1562, n.20 (11th Cir. 1996). The Second Circuit's decision in *Trapilo* raises anew whether the application of fraud statutes is essentially limitless. Mr. Pierce was prosecuted under the money laundering statute (with the predicate wire fraud statute serving as the "specified unlawful activity") for a scheme to defraud a foreign government of tax revenue even though such a prosecution clashes with the revenue rule and permits the harsh money laundering statute to be invoked in a manner that is inconsistent with the restrictions precluding its similar use for domestic tax-related prosecutions. While the government cites cases in its opposition where fraud statutes were held to apply to domestic tax fraud, these cases, upon careful reading, do not support the government's position and do not resolve the conflict between the First and Second Circuits.

The government apparently is seeking to restrict the application of the revenue rule to actions brought by a foreign government, such as the Canadian government, to enforce a foreign tax judgment. SG Opp. 8. There is no precedent for such an interpretative strait-jacket. *See also* Restatement (Third) of Foreign Relations § 483 (1987). The First Circuit in *Boots* specifically held that the revenue rule precluded prosecution under the wire fraud statute for a scheme to defraud a foreign government of tax revenue. 80 F.3d at 587.

An assessment of the facts alleged in the Indictment in this case illustrates the fallacy of the government's argument that construing foreign tax law would be unnecessary during the prosecution of Mr. Pierce. The alleged scheme involves evading Canadian taxes. The alleged victim of the scheme is

Canada. By prosecuting Mr. Pierce, the United States, through the Department of Justice and its federal prosecutors, is taking steps to enforce Canada's tax laws.

Mr. Pierce does not dispute the general notion that a scheme to defraud need not be successful in order to obtain a conviction. In a prosecution charging that petitioner participated in a scheme to evade payment of Canadian taxes, however, it is inevitable that Canada's tax laws will need to be interpreted in order to determine whether petitioner had the requisite intent to violate Canada's laws and whether his belief that Canada's tax laws did not apply to him was a reasonable one. *See Cheek v. United States*, 498 U.S. 192 (1991). The First Circuit held in *Boots* that Canada's tax laws must be interpreted for these reasons. This and the other significant differences in the two decisions support the view that this Court should resolve this confict before "it deepens."

For these reasons, as well as those set forth in Mr. Pierce's petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted,
Lyle David Pierce, III
By his attorney

Sheldon Krantz
(Counsel of Record)
Piper & Marbury L.L.P.
1200 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 861-3900

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